

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Alfred E. AILSWORTH 596 321

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2499

Alfred E. AILSWORTH

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 C.F.R. SS5.707(e).

By orders dated January 22 and February 8, 1990, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, ordered an outright suspension for twelve months of Appellant's Operator of Uninspected Towing Vessel license upon finding proved the charges of negligence and misconduct.

These charges arose out of a July 7, 1989, allision by Appellant's tug, the MILDRED A., while in tow of barge SL-7809, with a pier of the Jamison Cove Marina, as the flotilla was proceeding inbound on the Urbanna Creek in Virginia. The Administrative Law Judge found that Appellant throttled the engine beyond 900 rpm when backing full after attempting a turn, thereby activating an overspeed trip device which, as it was designed to do, caused the engine to stall.

The single specification supporting the charge of negligence alleged, essentially, that Appellant failed to adequately control the movements of the tug and tow. The two specifications supporting the charge of misconduct alleged that Appellant wrongfully failed to sound warning signals prior to the allision, in violation of 33 U.S.C. 2002(a), and wrongfully operated the tug without being familiar with the relevant characteristics of the vessel, in particular the overspeed trip of the main propulsion machinery, in violation of 46 C.F.R. 15.405.

Pursuant to a hearing held at Norfolk, Virginia, on 2 November 1989, wherein Appellant was represented by professional counsel, the Administrative Law Judge found proved all charges and specifications except that pertaining to the sounding of warning signals.

On 7 February 1990, Appellant filed a Notice of Appeal and a request that he be granted a temporary license pending the outcome of the appeal. The Administrative Law Judge entered an Order Denying Request for Temporary License on February 8, 1990. It is Appellant's timely appeal of the latter Order that is the subject of this Decision.

Appearance: Mr. R. John Barrett, Esq., Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, Virginia 23510.

BASES OF APPEAL

This appeal has been taken from the denial of a temporary license. Appellant contends that such denial constitutes an abuse of discretion since the evidence presented does not establish that Appellant's continued service under a temporary license would be incompatible with the requirements of safety at sea.

OPINION

As provided in 46 C.F.R. 5.707, a person whose license has been revoked or suspended outright may request the issuance of a temporary

license pending the outcome of the appeal of the main case. In responding to that request, the Administrative Law Judge must "...take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws." This inquiry serves to balance two conflicting policies: first, removal of an unfit mariner from the industry and elimination of further risk of harm to the public and, second, protection of an accused mariner's due process right to state his case on appeal without having already suffered the penalty, as well as the financial hardship, imposed by the decision at the hearing level.

Commission of any of the serious offenses described in 46 C.F.R. 5.61(a), gives rise to a rebuttable presumption that a mariner's continued service is incompatible with the requirements for safety at sea. 46 C.F.R. 5.707(c). For cases not listed in section 5.61(a), there is no such presumption. The Administrative Law Judge may not justify the denial of a temporary license in a non-presumption case by simply restating, without more, the charges and specifications of the case. *Commandant v. Lyons*, NTSB Order No. EM-141 (1987). Otherwise, a presumption would be implicit in each such case, unsupported by regulatory authorization, and there would be no reason for the listing in 46 C.F.R. 5.61(a).

In this case, Appellant's conduct creates no adverse presumption and, considering the record on appeal, there is insufficient basis to make a reasonable predictive judgment that his continued service will be incompatible with safety. I therefore vacate the February 8, 1990, Order of the Administrative Law Judge.

Appellant's record contains only one prior matter of any relevance. In 1982, Appellant was sanctioned for six vessel inspection, reporting and manning violations none of which had resulted in a maritime casualty. While not diminishing the seriousness of these violations nor countenancing in any way the appellant's behavior in that circumstance, I find that those violations are of only minimal relevance to the present inquiry, which is to determine whether granting Appellant's request for a temporary license would be incompatible with the requirements for safety of life and property at sea. The charges currently at issue, therefore, merit

the primary consideration in determining if the Administrative Law Judge has properly denied Appellant a temporary license. Even assuming that these charges are fully supported on the record, as must be the standard for the purposes of the present appeal, they do not appear to be so egregious as to tip the balance towards denial of the temporary license.

In summary, a denial of Appellant's request for a temporary license would have to be supported by evidence sufficient to enable a reasonable predictive judgment that Appellant's continued service would be incompatible with safety at sea. Balanced against the due process consideration of delaying the penalty until the appeal is completed, that level of proof has not been reached here.

CONCLUSION

Having reviewed the record, I find that the Administrative Law Judge abused his discretion in denying Appellant's request for issuance of a temporary license pending appeal and that such license should be issued forthwith.

ORDER

The Administrative Law Judge's Order Denying Request for Temporary License, entered 8 February 1990, is hereby VACATED with instructions that Appellant be issued a temporary license in accordance with applicable regulations.

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 3rd day of May, 1990.

***** END OF DECISION NO. 2499 *****